

C. If Unsatisfied After Directly Contacting the Telecommunications Provider, the Consumer May File a Fast-Track Complaint with the Commission; But the Provider Should Be Allowed More Than Five Days to Resolve the Problem, and All Complaints, Reports, Responses, and Evaluations Should Be in a Permanent Format [NPRM ¶¶ 126-143]

Under the FCC's proposal, if the direct contact with the equipment manufacturer or service provider does not resolve the problem to the consumer's satisfaction, the consumer may return to the Commission to file a complaint, thereby initiating the so-called "fast-track phase" of the complaint process. NPRM ¶¶ 126-143. While SBC generally supports the fast-track process, it has the following specific comments and concerns.

1. The Commission will have its staff obtain certain information from the consumer -- the consumer's name, address, identification of the equipment or service, and a description of how the equipment or service is inaccessible to persons with a particular disability. Id. ¶ 131. SBC requests that the Commission also ascertain the consumer's account number for the telecommunications service.

2. The Commission plans to forward the complaint to the appropriate manufacturer, service provider, or both. Id. ¶ 132. SBC recommends that each telecommunications or manufacturing company be required to establish only one point of contact to which all such complaints will be referred.¹² This will ensure that the FCC is able to notify companies of the

¹²For example, there would be a point of contact in each of SBC's telecommunications subsidiaries -- Pacific Bell, Nevada Bell, Southwestern Bell, Pacific Bell Mobile Services, Southwestern Bell Mobile Services, and Cellular One.

complaint in a timely and reliable manner. The Commission should also encourage, but not require, that the name of the company contact be made publicly available. See id. ¶ 134.

3. The Commission plans to allow consumers with disabilities to file their complaints "by any accessible means," including Braille, audio cassette, or telephone call. Id. ¶ 129.

The FCC seeks comment on whether it should forward complaints as submitted, regardless of format, or whether it should forward written translations or transcripts of complaints submitted in formats such as audio cassette, Braille, or TTY. Id. ¶ 135. SBC strongly urges the FCC to forward complaints to respondents in written English text, translated if necessary from the complainant's format or media. This approach has at least three advantages over requiring the respondent to translate. First, it allows the FCC to maintain some control over the accuracy of the translation. Second, it prevents the Commission from imposing the often costly burden of translation on small manufacturers and service providers. And third, it ensures that there is a common and verifiable understanding of the complaint and response in a permanent format. See id. ¶ 152 (recognizing that "a permanent format" is necessary to create "an appropriate record for decision-making").

4. The Commission proposes to allow the manufacturer or provider only five business days (from the date it forwards the complaint) "to study the complaint, gather relevant information, identify possible accessibility solutions, . . . work with the complainant to solve the access problem, if possible," and return to the FCC with its report. Id. ¶ 136. Five days is not realistic.

If a complaint can be resolved within five days, it is likely to have already been resolved during the pre-complaint referral process. See supra Part I.B. Most of the complaints that proceed to the fast-track phase, therefore, will involve more than a lack of communication or simple solution. Indeed, the FCC itself acknowledges the "likely complexity of many Section 255 complaints." NPRM ¶ 150; see also id. ¶ 162 (many complaints "are likely to present formidable difficulties to all concerned"). Section 255 complaints will require considerable analysis, deliberation, and consultation -- both within the company and outside. They often will require discussions with other parties and even consideration on an industry-wide basis. If the FCC wants more than slap-dash band-aid resolutions, it must afford companies more than five days to work through the access issues.

Moreover, if the deadline remains at five days, the FCC will be besieged with requests for extensions. See id. ¶ 137. To avoid taking the Commission's and the respondent's time addressing such extension requests -- and to avoid raising the complainant's expectation for a five-day resolution -- the Commission should propose a fifteen-to-thirty-day deadline to respond with a final action report or with a request for an extension upon a proper showing that "substantial efforts" to resolve the dispute are underway. Id.¹³

¹³The Commission tentatively concluded that the deadline will run "from the time [the FCC] forward[s] the complaint to the respondent." NPRM ¶ 136. In many instances, that date will be the same date the complaint is received by the respondent because the Commission will send it by facsimile or the Internet. In other cases, however, the Commission will elect to send the complaint (which, under the FCC's proposal, may be on audio cassette, id. ¶ 129) by overnight mail or the regular postal service; this would mean that the complaint is not received until one or more days after it is forwarded. SBC requests that the Commission eliminate this disparity -- and ensure that each provider is allowed the same amount of time to respond to the complaint -- by revising its proposal so that the clock will start on the date the complaint is

5. Under the FCC's proposal, a respondent may submit its action report "by telephone call" or "other oral" means. Id. ¶¶ 138-139. While SBC appreciates the Commission's attempt to be flexible, see id., we believe that it is in everyone's interest to require that the report be submitted in writing. That is the only way to ensure the creation of a permanent record, id. ¶ 152 (recognizing that "a permanent format" is necessary to create "an appropriate record for decision-making"), to minimize the possibility of misunderstandings, and to guarantee that an accurate "copy" of the report is sent to the complainant, id. ¶ 139 (seeking comment on how a telephonic report might be "copied"). The FCC can read the written text, if necessary, to communicate with the complainant.

6. After the respondent submits its report to the FCC, the agency plans to undertake an evaluation of the matter. Id. ¶ 140. The NPRM emphasizes that, even if the complainant is satisfied with the resolution of the complaint, the FCC may instigate further action against the respondent if "there was an indication of an underlying compliance problem." Id. SBC submits that the FCC should not devote its resources to pursuing matters that have been resolved to the satisfaction of the parties. Although we recognize that the FCC has a general obligation to ensure compliance with the Communications Act and has the authority to initiate its own investigations, the FCC casts doubt on its stated intention to allow the parties to resolve disputes on their own, without regulatory intervention, and in the most efficient manner possible. See id. ¶ 124. The FCC, therefore, should expressly limit its unsolicited intervention in proceedings to situations in which there is evidence of egregious behavior or systemic noncompliance.

received by the manufacturer or provider.

7. Even if the FCC determines that a matter should be closed, the complainant can elect to pursue the complaint to the second-phase dispute resolution. Id. ¶ 143. The FCC proposes "not to require any particular method for complainants to communicate their desire to continue to dispute resolution." SBC urges the Commission not to adopt such an undefined approach. It is, to say the least, an invitation to confusion. In a telephonic conversation, for example, an FCC employee could easily misinterpret a complainant as not wanting to proceed ahead, when in fact the complainant did. And the opposite will also be true. To avoid such inevitable misunderstandings -- and the resulting frustration -- the FCC should require complainants to express their intention to continue proceedings in a permanent written format.

D. The Commission Should Impose a Standing Requirement for Informal and Formal Complaint Proceedings [NPRM ¶ 148]

SBC urges the FCC to reconsider its proposal not to impose a standing requirement for complaints under Section 255. NPRM ¶ 148. Congress drafted Section 255 to ensure that telecommunications equipment and services would be accessible by "individuals with disabilities" or, alternatively, would be compatible with devices and CPE commonly used by "individuals with disabilities." 47 U.S.C. § 255(b), (c), (d). Congress's concern was plainly for "individuals with disabilities." It makes no sense, in that event, for the FCC to allow all persons or entities -- without regard to their disabled status, alleged injury, or relationship to the manufacturer or service provider at issue -- to complain about violations of Section 255's mandates. Such an approach violates all prudential notions of standing, and is contrary to legislative intent.

Furthermore, when Congress wanted the FCC to abandon standing requirements in the Communications Act, it has said so explicitly. In Section 208 of the Act, Congress expressly stated that "[n]o complaint shall . . . be dismissed because of the absence of direct damage to the complainant." 47 U.S.C. § 208(a). The lack of a similar provision in Section 255 demonstrates that Congress intended for some standing requirement to be imposed. See Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); Beach v. Ocwen Federal Bank, 118 S. Ct. 1408, 1413 (1998) (same)).

Contrary to the FCC's assumption, the purposes of Section 255 are not "best served" by allowing any person or entity to file an accessibility complaint. NPRM ¶ 148. Such a policy would invite companies to file baseless complaints against their competitors for simple harassment value. It also would allow parties to file complaints seeking access to certain equipment or services when, in reality, there may be no demand for such access. These abusive and misguided (although perhaps well intended) complaints would only serve to consume the scarce resources of the FCC and to distract the attention of responding manufacturers and providers, thereby leaving less resources to devote to proper complaints by "individuals with disabilities." With these concerns in mind, SBC proposes that the Commission require that a complainant show that he either is someone who is prevented from accessing or using the respondent's product or service, or is an association or individual acting on behalf of such a

person. This approach, we believe, is consistent with the FCC's aim to not overly restrict the process and to avoid burdensome disputes over whether an individual is in fact disabled.¹⁴

E. Generally Thirty Days To Answer an Informal Complaint Will Be Sufficient [NPRM ¶ 150]

Recognizing the "likely complexity of many Section 255 complaints," the Commission proposes to allow thirty-calendar days for a respondent to answer an informal complaint. NPRM ¶ 150.¹⁵ Generally speaking, this amount of time will be adequate to reply.

The FCC, however, should willingly extend the deadline upon request, if the parties can demonstrate that they are making significant progress toward resolution. This approach would allow parties to resolve their disputes without taxing the Commission's limited resources.

F. The FCC Should Require That a Complainant File a Formal Complaint and Should Ensure Parity with Respect to a Filing Fee [NPRM ¶¶ 154-155]

The formal complaint process, which affords the complainant the right to conduct discovery, NPRM ¶ 147 n.260, is more "burdensome" on both the parties and the Commission

¹⁴At a minimum, the Section 255 complaint process should be restricted to consumers, or representatives of consumers, of the product or service being challenged. The FCC implicitly suggests an intent to so limit these complaint proceedings in its discussion of the fast-track process. See, e.g., NPRM ¶ 128 (discussing contact "by a consumer"). A standing requirement, of course, will not limit the FCC's general authority to investigate alleged violations of Section 255. Cf. id. ¶ 140 (even if "the complainant's access problem [is] satisfactorily resolved," the FCC will continue its investigation if "there is an indication of an underlying compliance problem").

¹⁵A respondent will also have thirty days to answer a formal Section 255 complaint. See NPRM ¶ 154; 47 C.F.R. § 1.724(a). Strangely, however, the FCC seems tentatively to allow fifteen days for a complainant to reply in an informal proceeding, NPRM ¶ 154, while allowing only ten days in a formal one, id.; 47 C.F.R. § 1.726.

than the informal process, id. ¶ 146. In recognition of the added rights and burdens, the Commission traditionally required the complainant to plead formal complaints with "specificity" and to support all claims with affidavits and documentation. 47 C.F.R. § 1.720. In the NPRM, the FCC proposes to abandon these pleading requirements for Section 255 formal complaints, by allowing a complainant to move into formal proceedings at the end of the informal process, without re-filing a complaint. NPRM ¶ 154. The FCC also proposes not to require its customary filing fee for Section 255 complaints against non-common carriers. Id. ¶ 155. The FCC should reconsider these proposals.

At the end of the informal process, the complaint will contain minimal information: the complainant's name, address, an identification of the equipment or service, and a description of how the equipment or service is inaccessible to persons with a particular disability. See id. ¶ 131. Without more detail than this, a company simply will not be able to respond with any precision. Moreover, since formal complaints are "generally resolved on a written record consisting of a complaint, answer and reply" (and without independent investigation by the Commission), 47 C.F.R. § 1.720, the complainant will -- eventually -- have to provide the supporting affidavits and documentation traditionally required up-front. There seems to be little reason to delay the introduction of such materials, which are designed to focus the proceeding on the specific issues in dispute.

To avoid needlessly drawing out the complaint process, a complainant should also be required to request formal proceedings within six months of the date that the respondent filed its

answer in the informal proceeding. See NPRM ¶ 154. Such a requirement would be consistent with the standard that applies to Section 208 complaints. 47 C.F.R. § 1.718.¹⁶

Finally, in determining whether to impose a filing fee, the FCC must ensure that there is parity among the defendants to the Section 255 complaint. As the Commission notes, NPRM ¶ 155, Section 8 of the Communications Act imposes a filing fee on all formal complaints against common carriers. 47 U.S.C. § 158(g). A substantial portion of Section 255 complaints will be against such carriers and hence subject to this fee (absent a waiver under Section 8(d)(2)). It would create an arbitrary disparity between common carriers on the one hand, and all others who are subject to Section 255 on the other, to require filing fees to raise a claim against the former but not the latter. Moreover, if a disparity persists, complainants may attempt to "game" the system by filing against a non-common carrier, when the real complaint is against the carrier -- the complainant knowing full well that the respondent will then join the true target in the proceeding.

While Congress requires that the FCC recover the costs of formal complaint proceedings through filing fees, see Report and Order, Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 948 (1987) (FCC must charge the users of FCC services what it costs the agency to take certain regulatory actions), Congress also created a mechanism through which those fees can be waived. See 47 U.S.C. § 158(d)(2) (FCC can waive the fee for formal complaints "in any

¹⁶When a complainant elects to move from the informal to the formal process, the thirty-day deadline for the respondent to file its answer should start anew.

specific instance for good cause shown, where such action would promote the public interest.”). The FCC should notify the disability community that this waiver process is in place and should exercise its authority to waive fees on a case-by-case basis for consumer complaints where such actions would promote the public interest.¹⁷

G. A Motion for Joinder Should Be Pleaded with Specificity [NPRM ¶ 154]

The FCC proposes to allow joinder of respondents, so that a service provider could join an equipment manufacturer, or vice versa, if the other “is in part responsible for allegedly deficient accessibility” or if an effective solution would require the participation of the other entity. NPRM ¶ 154. SBC agrees with the proposal in principle, but is concerned that such motion to joinder will become routine, and applied when the circumstances do not warrant it. To avoid its improper use, SBC recommends that the Commission require that a motion for joinder contain a full statement of the relevant facts, including supporting documentation, that demonstrate a clear link between the action complained of and the joined party.

¹⁷The Commission has ruled it will grant waivers “on a case-by-case basis in extraordinary and compelling circumstances upon a showing that a waiver or deferment would override the public interest in reimbursing the Commission for its regulatory costs.” NPRM, Implementation of Section 9 of the Communications Act, 9 FCC Rcd 6957, 6970 (1994). See also Report and Order, 2 FCC Rcd at 948 (“The legislative history [of Section 8(d)(2)] unequivocally states that our discretion to waive or defer fees shall be narrowly defined.”).

H. Alternative Dispute Resolution Will Be a Productive Method of Resolving Accessibility Issues [NPRM ¶¶ 157-161]

SBC agrees that alternative dispute resolution ("ADR") can be an effective tool for addressing accessibility concerns. Once the parties mutually agree to its use,¹⁸ and the FCC consents, the FCC need not further involve itself in the process. NPRM ¶ 159. The statute, 5 U.S.C. §§ 571-584, and the FCC regulations implementing the statute, anticipate that the ADR process will operate without agency intervention.

I. Evidence That a Respondent Has Made Good-Faith Efforts To Comply with Section 255 Should Be Considered in Evaluating a Complaint [NPRM ¶¶ 162-171]

SBC strongly supports the FCC's decision to consider a respondent's good-faith efforts to comply with Section 255 in evaluating a complaint. NPRM ¶¶ 164-166. In considering a good-faith-effort defense, the Commission would take into consideration all actions by the respondent "that would tend to increase the accessibility of its product offerings, both generally and with respect to the particular product that is the subject of the complaint." Id. ¶ 164. As the FCC explained, the examples listed (e.g., those set forth in paragraph 165, in the Access Board guidelines, and in the Appendix to the Access Board Order) would not be mandatory requirements, but would be evidence of an intent to comply with Section 255. NPRM ¶ 166 (the "guidelines" are not a "laundry list" of requirements all firms . . . must adopt").

¹⁸5 U.S.C. § 572 ("if the parties agree"); id. § 575(a)(1) ("whenever all parties consent"); see also Air Line Pilots Ass'n v. Miller, No. 97-428, 1998 U.S. LEXIS 3403, at *19 (U.S. May 26, 1998) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960))).

J. The FCC Should Not Order a Respondent To Retrofit Equipment or Service As a Penalty for Non-Compliance [NPRM ¶ 172]

Basically SBC agrees with the FCC's proposed penalties for non-compliance with Section 255. NPRM ¶ 172. The penalties traditionally available for violations of the Communications Act should be applicable for a violation of Section 255; and penalties against manufacturers and service providers should be similar. SBC further agrees that the most onerous sanctions -- an order of forfeiture, to revoke a license, or to cease and desist -- should be reserved for willful or repeated violations of law. Id.


The Commission should not, however, require a respondent to retrofit a piece of equipment or service. Id. It makes no sense to require a company to retrofit equipment to meet the standards of technology that applied when equipment was first manufactured. By the time the FCC orders such retrofitting, technological innovations will likely have made the old standard obsolete. And requiring improvements on an out-of-date model will only stifle future improvements. The cost of retrofitting, in addition, will often exceed any reasonable penalty. Therefore, the Commission should require a manufacture or provider to modify its equipment or service only when the company substantially changes or upgrades its product. Such an approach would be consistent with the recommendation of the Telecommunications Access Advisory Committee. See Telecommunications Access Advisory Committee, Final Report, Access to Telecommunications Equipment and Customer Premises Equipment by Individuals with Disabilities, January 1997, at § 4.2.

**K. The FCC Should Encourage the Telecommunications Industry
To Develop Other Measures To Increase Accessibility to
Individuals with Disabilities [NPRM ¶ 174]**

In the NPRM, the FCC asks whether there are other measures that it might take to increase accessibility to telecommunications products and services -- for example, by establishing a clearinghouse of information on telecommunications disabilities issues, publishing information regarding a company's performance, and developing a peer review process to complement the implementation measures. SBC thinks that these are important initiatives that should be implemented. But they should be implemented not by the FCC, but by the industry working together with consumer groups. The Commission can effectively encourage such activities by making a company's participation in these efforts evidence of a good-faith effort to comply with Section 255. See NPRM ¶¶ 164-166.

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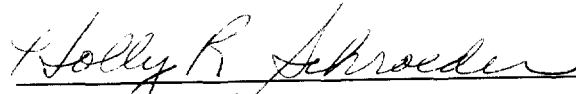

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CERTIFICATE OF SERVICE

I, Holly R. Schroeder, hereby certify that on this 30th day of June, 1998, copies of SBC Communications Inc.'s Comments in the foregoing matter were served by hand delivery upon the following parties.


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SBC UNIVERSAL DESIGN POLICY

Preface: Universal design is critical to millions of Americans who depend on telecommunications accessibility for employment, education, social interaction, recreation and other life activities. Access to telecommunications allows persons with disabilities greater participation in society, without which they face pervasive challenges. SBC's commitment to universal design principles is a tangible demonstration of the value SBC places on the worth and dignity of all individuals, including people with disabilities. SBC is committed to universal design.

Policy Summary: SBC supports universal design to make new telecommunications products and services accessible to and usable by individuals with disabilities, consistent with Section 255 of the Telecommunications Act of 1996 (the Act) and the Americans with Disabilities Act of 1990 (ADA).

Policy Application:

- "[Universal Design] is the practice of designing products so that they are usable by the broadest possible audience. Products designed in this way are usable by more people without reducing the usability or attractiveness for mass or core audiences of the product. With universal design, the goal is to ensure maximum flexibility, benefits, and ease of use for as many individuals as possible." (Telecommunications Access Advisory Committee Final Report, January, 1997 §1.2)
- SBC supports the application of universal design principles in developing new telecommunications services and products to make telecommunications products and services more appealing and useful to the broadest range of customers.
- Universal design means creating products and services that address the needs of its customers, including
 - children,
 - aging customers and
 - those with temporary or permanent disabilities affecting
 - vision,
 - hearing,
 - mobility,
 - speech or
 - cognition.
- Actively involving and listening to a wide variety of customers throughout the design process ensures that the resulting products and services build in flexibility to meet customers' needs, particularly for those with disabilities.
- It is easier and more cost effective for access to telecommunications to be addressed at the design stage, than later at the retrofit stage.

- All SBC subsidiaries and organizations will evaluate universal design implications at the design phase of new products, services and enhancements to SBC's product and service offerings.
- Universal design is incorporated into on-going operations by
 - designing greater accessibility into new products and services from the start and by
 - building in alternative means of access, where feasible consistent with Section 255, through:
 - 1) development and adherence to industry standards,
 - 2) use of standard interfaces,
 - 3) open network architecture, and
 - 4) user-centered design.
- Market research, consumer input to product conceptualization, human factors analysis, field trials and consumer input on product marketing will consciously include persons with various disabilities.
- SBC will advocate industry standards that conform to universal design principles.
- Suppliers providing new products and services will be required as part of their contract to address universal design and accessibility.

Background:

- Pacific Telesis adopted its policy on universal design in 1995. In connection with the merger of SBC and Pacific Telesis, SBC recognized the progress achieved by Pacific Telesis in universal design and committed to develop a SBC policy drawing on Pacific's experience and SBC's current work.
- SBC also committed, within six months of the merger, to begin work with disability leaders in Southwestern Bell and Pacific Bell territories to plan and implement a universal design process. The merger was approved April 1, 1997.
- This universal design policy will enhance SBC's ability to meet the requirements of Section 255 of the Act. Section 255 requires telecommunications service providers to ensure their services are accessible to and usable by individuals with disabilities, if readily achievable. The FCC will adopt rules for telecommunications service providers to implement Section 255.
- The Act also requires the FCC, in conjunction with the Architectural and Transportation Barriers Compliance Board, to develop accessibility guidelines for telecommunications equipment and customer premise equipment manufacturers.
- A key issue in the FCC proceedings will be how the definition of "readily achievable", adopted from the ADA will be interpreted in the context of telecommunications services and products. "Readily achievable" as defined

in Section 301(9) of the ADA, means "easily accomplishable and able to be carried out without much difficulty or expense."

- There are a number of factors to be considered in making the "readily achievable" determination. These factors include: the cost of the action needed under the Act, the impact of the action on the overall financial resources of the business, the overall financial resources, size, number of employees, number of locations, and the type of business.
- The ADA definition applies to the removal of architectural barriers in existing buildings and facilities. The FCC will adapt this definition to telecommunications.

- SBC commits its good faith efforts to apply universal design principles to its development of new products and services offerings.
- Any subsidiary or organization introducing a product or service that is not accessible must demonstrate to senior management that universal design cannot be readily achieved, despite good faith efforts.
- SBC will not use "if readily achievable" as an excuse to avoid full, good faith compliance with its commitment to universal design principles or the law.

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Approved June 3, 1998